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PUBLIC PROSECUTOR

v.

KONG TSHOI KIEW

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HIGH COURT SABAH & SARAWAK, SIBU

TUAN MUHAMMAD KAMIL AWANG J

[CRIMINAL APPEAL NO. 20-41-23 OF 1995]

4 JANUARY 1996

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CRIMINAL LAW: *Assisting in carrying on illegal public lottery - Section 4A(a) Common Gaming House Act, 1953 - Sketchy evidence by gambling expert - Whether sufficient to prove a prima facie case.*

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CRIMINAL PROCEDURE: *Close of prosecution case - Duty of Court - Maximum evaluation approach - Accused charged with assisting in carrying on illegal public lottery - Prosecution relying on evidence of gambling expert - Whether evidence of expert so sketchy and inadequate - Whether Court understood modus operandi of lottery - Assessment of evidence - Failure of trial Magistrate to assess evidence - Whether fatal - Calling of defence at end of prosecution case - Whether a misdirection - Common Gaming House Act, 1953 s. 4A(a) - Criminal Procedure Code ss. 180, 399 - Evidence Act, 1950 ss. 45 -51.*

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EVIDENCE: *Expert evidence - Admissibility - Whether Court bound to make a finding whether or not to admit evidence - Whether inadmissible unless proved by other admissible evidence - Whether could only be admitted if Court unable to make a decision on a scientific fact - Duty of expert witness - Whether to give reasons for his conclusions - Whether to furnish trial Judge with scientific criteria with which to test the accuracy of his opinion - Evidence Act 1950 ss. 45 - 51 - Criminal Procedure Code s. 399.*

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The police had retrieved a small piece of paper with a few numbers written on it from the person of the respondent. The piece of paper was examined by the gambling expert, and in consequence, the respondent was charged with an offence under the Common Gaming House Act, 1953, for assisting in the carrying on of an illegal 4-digit public lottery. At the trial, at the close of the case for the prosecution, relying virtually on the evidence of the gaming expert,

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the learned Magistrate held that a *prima facie* case had been made out, and so, called for the defence. Nonetheless, having heard the defence, she ruled that the defence had raised a reasonable doubt, and on that ground, acquitted and discharged the respondent.

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It was not in dispute that, before the learned Magistrate, apart from his testimony that “the piece of paper (P2) is recorded with 6 illegal 4-digit lottery tickets with stakes of RM12.50. In my opinion this is the record

*of stakes pertaining to illegal 4-digit lottery ...”, the gambling expert did not furnish the Court with any criterion by which he came to his conclusions. It was also not in dispute that, in accepting the expert's evidence, and hence in calling for the defence, the learned Magistrate had not made any independent assessment as to whether the said piece of paper was a lottery. In this appeal by the Public Prosecutor, a question *inter alia* arose as to whether the learned Magistrate, when calling for the respondent's defence, has misdirected herself in law.*

Held:

- [1] In our adversary system, the prosecution has to prove its case, and if the prosecution has failed to do this, then the accused is entitled to an acquittal without the defence being called. This is clearly reflected in s. 180 Criminal procedure Code. *a*
- [2] The duty of the Court at the close of the case for the prosecution is to carry out a maximum evaluation of the prosecution evidence, and if the Court finds that the case is proved, which if unrebutted, would warrant a conviction, then, and only then the defence is called. *d*
- [3] It is the duty of an expert witness is to furnish the Court with necessary scientific criteria for testing the accuracy of his conclusions so as to enable the Court to form its own independent judgment. In the present case, it is the expert's role to explain to the learned Magistrate the application of the necessary criteria so as to enable the Magistrate to come to her own judgment by the application of these criteria to the facts proved as facts. It follows from this, that the facts upon which the expert's opinion is based must be proved by admissible evidence. It further follows that expert evidence should only be admitted if the Court is not in a position to make a decision on a scientific fact. *e*
- [4] In the instant case, the learned Magistrate did not consider whether the opinion of the gambling expert was an admissible evidence. Rather she accepted the opinion as a gospel truth without needing to have it proved. It was clear that the learned Magistrate had not come to her own independent conclusion whether or not to accept the expert evidence. *f*
- [5] The learned Magistrate had clearly misdirected herself in law for failing to carry out a maximum evaluation of the prosecution case before calling the respondent to enter her defence. It had not been proved to the satisfaction of the Court that the said piece of paper was a lottery. The expert evidence as given by the gambling expert was clearly wanting. It was so sketchy and threadbare that it was difficult or hardly sufficient for the Magistrate to understand the subject-matter of the charge, leave alone to know and understand the mechanic or *modus operandi* of a lottery. An expert evidence based on his opinion is thus just like any other *g*
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a opinion which is inadmissible unless it is proved to the satisfaction of the Court by other admissible evidence. It follows that at the close of the prosecution case, the respondent ought to have been acquitted and discharged without her defence being called for.

b [6] Looking at the prosecution case, one cannot help noticing that there were apparent flaws in the record of the case in that the prosecution had not made out its case at the end of the prosecution case. It follows therefore that at the close of the case for the prosecution, the learned Magistrate ought to have acquitted and discharged the respondent without calling for her defence.

c **Per Curiam:** It is worth reminding the lower Courts that in a criminal trial where the accused is not represented, the trial Judge must be more cautious and examine the prosecution evidence that every ingredient of the offence is proved. The formula of a maximum evaluation of the evidence must be adhered to even if the accused has not entered a plea of no case to answer.

d [Appeal disallowed]

Cases referred to:

e *Tan Boon Kean v. PP* [1995] 3 AMR 3007 (*refd*)
PP v. Chang Sin Chan & Anor. [1994] 4 CLJ 176 (*cit*)
Khoo Hi Chiang v. PP [1994] 1 AMR 6 323; [1994] 2 CLJ 151 (*fol*)
Yeo Tse Soon & Anor. v. PP [1995] 2 CLJ 179 (*fol*)
Davie v. Edinburgh Magistrates [1953] SC 34 (*fol*)
PP v. Lee Ee Teong [1953] 19 MLJ 244 (*refd*)
Sek Kim Wah v. PP [1988] 1 MLJ 348 (*refd*)
f *Wong Chop Saow v. PP* [1965] 1 MLJ 247
PP v. Ngiao Nam Khin [1963] 29 MLJ 264 (*refd*)
Ong Yep Chang v. PP [1962] 28 MLJ 46 (*refd*)

For the appellant - Ahmad Zubir bin Jantan, DPP
For the respondent - In person

g **JUDGMENT**

Muhammad Kamil Awang J:

The respondent was charged as follows:

h That you on 12 October 1992 at about 11.30 a.m. at an unnumbered house at the back of Kanowit District Hospital, in the State of Sarawak, did assist in carrying on a public lottery, to wit, illegal 4-Digit lottery and that you have thereby committed an offence punishable under s. 4A(a) of the Common Gaming House Act 1953.

i At the end of the trial, the learned Magistrate acquitted and discharged the respondent on the grounds that the defence had raised a reasonable doubt as to the truth of the prosecution evidence.

Learned Deputy Public Prosecutor appealed against the order of acquittal and discharge, and advanced 4 grounds in the appeal, namely: **a**

1. The learned trial Magistrate had erred in law and fact in coming to the conclusion that the evidence of DW2 had created a reasonable doubt in the Court's mind, viz. **b**

(a) that the evidence was overwhelming to show that DW1 was in possession of the incriminating Exh. (P2), and

(b) that the Magistrate had misdirected herself on the distinction between owner of the exhibit with the person found in possession of it. **c**

2. The learned Magistrate was right to invoke the presumption under s. 11(1)(c) of the Common Gaming House Act 1953 against the accused/respondent but erred in law in holding that to "create a reasonable doubt" was sufficient standard of proof to rebut the presumption. **d**

3. The learned Magistrate erred in law and practice to believe DW2 evidence without corroboration: **e**

(a) DW2 is an accomplice in her capacity as aiding and abetting in the commission of the offence; **f**

(b) there is no corroboration in the evidence of DW1 and DW2. **g**

4. The learned Magistrate's decision in acquitting and discharging the respondent is most unsatisfactory and cannot be supported having regard to the weight of the evidence adduced by the prosecution. **h**

The factual background of the case are briefly these. **i**

On the day in question, PW1 Inspector Izanizam led a party consisting of five police officers, in a raid on an unnumbered house behind the Kanowit District Hospital, which was believed to be the house where an illegal lottery took place. On arrival at the house there were two persons, a man and woman, in the house. The party searched the house from top to bottom and discovered nothing of interest. Then there came a woman (the respondent) riding on a motor cycle to the house, and she was taken into a room in the house, where in the presence of the two occupants of the house, she was physically searched by a WPC Munica (PW3); nothing was found. However, from inside the left pocket of her jean there was a small purse, and in the purse a small piece of paper with certain numbers written on it (Exh. P2) was retrieved. PW3 handed over the piece of paper to PW1. The respondent was then arrested and taken to the police station. **g**

PW1 handed Exh. P2 to PW5 (Inspector Tieu Leong Seng), a gambling expert from the police Department. PW5 carried out an examination on P2 and testified that: **h**

PW1 handed Exh. P2 to PW5 (Inspector Tieu Leong Seng), a gambling expert from the police Department. PW5 carried out an examination on P2 and testified that: **i**

a ... The piece of paper (p2) is recorded with 6 illegal 4-Digit lottery tickets with total and stakes of RM12.50. In my opinion this is the record of stakes pertaining to illegal 4-Digit lottery. The date is Monday whereby on this day a legal lottery conducted by Magnum Corporation Berhad.

b From my knowledge and research, the illegal 4-Digit lotteries are based on the result of the Magnum Corporation Sendirian Berhad.

The learned Magistrate found that the prosecution had made out a *prima facie* case and called on the respondent to enter her defence. The respondent was unrepresented.

c In a statement from the dock, the respondent (DW1) said that it was a long time ago [1992] that she had been asked by a friend to buy something like a toto (ticket), which was open to the public. The friend (DW2) gave her some money and a small piece of paper torn an old newspaper, on which were written certain numbers (Exh. P2). It was the friend who wrote the numbers.

d As she was going to Sibu taking an old lady to see a doctor, she was to buy the ticket. She forgot to buy the ticket and refunded the money.

e DW2, a neighbour who lived about ½ mile from the respondent's house and whom she had known for 20 years, testified that she had a good dream one day and had asked the respondent to buy her a ticket as the latter was going to Sibu taking the grandmother to see a doctor. DW2 gave DW1 the piece of paper (Exh. P2) and RM20.00. When DW1 returned to the sister-in-law's house later DW1 was arrested. However, DW1 returned the money that DW2 had given her earlier.

f In the cross-examination, DW2 denied vehemently that she had told a lie in order to help her friend (the respondent). She admitted that she had been arrested twice before, but did not say the reasons for the arrests or what were the outcome therefrom.

g Now looking at the prosecution case, one cannot resist noticing that there are apparent flaws in the record of the case, which means that the prosecution had not made out its case at the close of the prosecution case. In our adversary system, the prosecution has to prove its case, and if the prosecution has failed to do this, then the accused is entitled to an acquittal without the defence being called. This is clearly stated under s. 180 of the Criminal Procedure Code (FMS Cap. 6), that the prosecution has to establish a *prima facie* case before the defence is called. Section 180 states:

h When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall

i call on the accused to enter on his defence.

The Federal Court in *Tan Boon Kean v. Public Prosecutor* [1995] 3 AMR 3007 had clarified the provisions of s. 180 of the Code that: a

The ‘case’ which the prosecution has to establish before a decision can be made as to whether the defence is called, after a submission of no case to answer, is whether on the evidence as it stands, the accused could lawfully be convicted, which is a question of law. b

See also *PP v. Chang Sin Chan & Anor.* [1994] 4 CLJ 176.

The Federal Court quoted with approval the principle as enunciated in its earlier case of *Khoo Hi Chiang v. PP* [1994] 1 AMR 6 323; [1994] 2 CLJ 151, as follows: c

... the Court had to conduct a maximum evaluation of the evidence at that stage of the trial to ensure that on the evidence the Court would be prepared, then and there, to convict should the accused say nothing, before the accused can be called to enter upon his defence. Therefore, the prosecution had to tender evidence, which if unrebutted, would warrant a conviction. d

The duty of the Court at the close of the case for the prosecution is to carry out a maximum evaluation of the prosecution evidence, and if the Court finds that the case is proved, which if unrebutted, would warrant a conviction, then, only then that the defence is called. See also *Yeo Tse Soon & Anor. v. PP* [1995] 2 CLJ 179. It is worth reminding the lower Courts that in a criminal trial where the accused is not represented, the trial judge must be more cautious and examine the prosecution evidence that every ingredient of the offence is proved. The formula of a maximum evaluation of the prosecution evidence must be adhered to even if the accused has not entered a plea of no case to answer. e
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In the instant case, the learned Magistrate had misdirected herself in law for failing to carry out a maximum evaluation of the prosecution evidence at the end of the prosecution case before calling the respondent to enter her defence. It had not been proved to the satisfaction of the Court that Exh. P2 was a lottery. It is to be observed that the expert evidence given by the gambling expert (PW5) was wanting. It was so sketchy and threadbare that it was difficult or hardly sufficient for the magistrate to understand the subject-matter of the charge, leave alone to know and understand the mechanic or modus operandi of a lottery. An expert evidence based on his opinion is just like any other opinion which is inadmissible unless it is proved to the satisfaction of the Court by other admissible evidence. The learned Magistrate did not consider whether PW5’s opinion was an admissible evidence, she just accepted the opinion evidence as a gospel truth without proof of it. She had not come to her own independent conclusion whether or not to accept the expert evidence. g
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The duty of the expert witness as stated by Lord Cooper in *Davie v. Edinburgh Magistrates* [1953] SC 34 at p. 40:

- a** is to furnish the Judge or jury with necessary scientific criteria for testing the accuracy of their (the witnesses') conclusions so as to enable the Judge or jury to form their own independent judgment.

In Malaysia, the procedure for admittance of expert opinion is given under s. 399 of the Criminal Procedure Code. Its acceptance is regulated by s. 45 of the evidence Act 1950, and by ss. 46-51 of the Act opinion of various experts and fields become relevant. Expert evidence should only be admitted if the Court is not in a position to make a decision on a scientific fact. The value of scientific fact to the Court lies in its interpretation and the translation on scientific fact into an opinion of its worth in the case being tried.

- c** In *PP v. Lee Ee Teong* [1953] 19 MLJ 244, where in a lottery case his Lordship Thomson J (as he then was) held that:

... the evidence so given, must, in itself, be sufficient to prove that:

- d** (a) The person giving it had special means (which he must describe) of knowing the habits of persons who conduct and assist in conducting lotteries, and
- (b) Persons who conduct lotteries or collect subscriptions thereto keeps records of a particular sort, and
- (c) That the documents in evidence, is, in his opinion, such a record.

e It is not open to any Judge or Magistrate to import his personal knowledge on the point into a criminal trial so as to help out evidence for the prosecution which would otherwise be inadequate to support a conviction.

f It would be pertinent to add that the facts on which an expert's opinion is based must be proved by admissible evidence, just like any other fact relevant to the case. The expert's role is to explain to the Magistrate the application of the necessary scientific or medical criteria so as to enable the magistrate to come to his own judgment by the application of these criteria to the facts proved in evidence - *per incuriam* in *Sek Kim Wah v. PP* [1988] 1 MLJ 348.

g The Magistrate must come to a finding that he either accepts or rejects the evidence of the expert witness *vis-a-vis* characters lottery - *per Hashim J* in *Wong Chop Saow v. PP* [1965] 1 MLJ 247.

h His Lordship Suffian J (as he then was) in *PP v. Ngiao Nam Khin* [1963] 29 MLJ 264 has this to say about the role of the prosecutor and the Magistrate in the trial:

i Before the expert witness had concluded his evidence the prosecution officer should have asked the Magistrate whether he was satisfied or required further explanation and then if the Magistrate required further explanation, the prosecution officer should have asked the expert the necessary questions to elicit the further explanation required by the Magistrate.

Further:

Where the Magistrate requires the descriptions by expert witness of the modus operandi of the characters lottery for his own enlightenment then it is the duty of the prosecution to supply them and if they fail to do so they cannot complain if the Magistrate acquits.

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In *Ong Yep Chang v. PP* [1962] 28 MLJ 46, Adams J said:

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... as the expert had given no reasons for his conclusions, the learned Magistrate was in no position to Judge whether the evidence of the expert was in fact acceptable. There was therefore no evidence on which he came to his finding that the exhibits were in fact a record of stakes.

In the instant case, the learned Magistrate had failed to direct her mind properly on the expert evidence, then assess it and come to a conclusion. The expert evidence was not adequate and she was not able to form her own independent judgment whether Exh. P2 was a lottery. As the respondent was not represented, the Court ought to be very vigilant and insist on a strict proof on the expert evidence before admitting it. In her judgment, it was not expressly stated that she had accepted and admitted the expert evidence. The failure by the learned Magistrate to do so tantamounts to a substantial miscarriage of justice. As such at the close of the prosecution case, the respondent was entitled to an acquittal, and should have been acquitted and discharged without calling for her defence.

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It is not necessary or incumbent for me to go on to discuss the defence in this case. Suffice to say that the appeal has no merits and should be dismissed.

Appeal dismissed.

Reported by W.A. Sharif *f*

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